Problems of Compulsory Jurisdiction and the Settlement of Disputes Relating to Straddling Fish Stocks

must of course be maintained, but they should also be accountable for compliance with their obligations insofar as these affect other states or the international community as a whole. The exception for sovereign rights created by Article 297(3) of the Convention and incorporated in the 1995 Agreement should thus be construed narrowly, to cover only the exercise of coastal state discretion on matters that are purely of EEZ concern only, i.e. matters which do not affect straddling stocks, whether inside or outside the EEZ.

Introduction

No single category of international disputes since 1945 has generated more litigation than the law of the sea. At least 11 cases have been the subject of judgments in the ICJ,[1] with a further two awaiting judgment on the merits.[2] During the same period there have been six arbitrations[3] and one conciliation award.[4] As Judge Oda has observed, the contribution of these cases, and in particular those of the ICJ and PCIJ, to the formation of a comprehensive and organised body of law of the sea cannot be overestimated.[5] Some seven of these cases were principally about fishing stocks: three were disputes over fishing rights between coastal and distant water fishing states and a further three dealt with maritime boundaries where fisheries were the principal economic interest at stake. The remaining case, an arbitration, involved onshore facilities and fish processing rights. More recently, the *Tuna–Dolphin* and *Shrimp–Turtle*[6] cases in the GATT dispute system indicate that fisheries disputes have lost none of their economic importance to states. Finally the first and so far only case before the International Tribunal for the Law of the Sea is also a fisheries dispute insofar as it involves the supply of fuel to distant water fishing vessels operating in the EEZ of the respondent state.[7] As we shall see below the characterisation of this case as a fishing dispute is a critical jurisdictional issue in the case.

1 *Corfu Channel Case* (1949) ICJ Rep 3; *Norwegian Fisheries Case* (1951) ICJ Rep 116; *North Sea Continental Shelf Case* (1969) ICJ Rep 3; *Fisheries Jurisdiction Cases* (1974) ICJ Rep 3 and 175; *Aegean Sea Continental Shelf Case* (1978) ICJ Rep 3; *Tunisia/Libya Continental Shelf Case* (1982) ICJ Rep 18; *Gulf of Maine Case* (1984) ICJ Rep 246; *Libya/Malta Continental Shelf Case* (1985) ICJ Rep 13; *Land, Island and Maritime Frontier Case* (1992) ICJ Rep 35; and *Jan Mayen Case* (1993) ICJ Rep 38; *Fisheries Jurisdiction Case* (Spain/Canada) (1998) ICJ Rep.

2 *Qatar/Bahrain Maritime Delimitation Case*; *Land and Maritime Boundary Case* (Cameroon/Nigeria).

3 *Anglo-French Continental Shelf Arbitration* (1978) Cmnd 7438; *Guinea–Guinea-Bissau Maritime Boundary Arbitration* (1985) 35 ILM 251; *Franco-Canadian Fisheries Arbitration* (1986) 90 RGDIP 151; *St Pierre and Miquelon Arbitration* (1992) 95 ILR 645; *Sharjah–Dubai Arbitration* (1981) 91 ILR 543; and *Beagle Channel Arbitration* (1977) 52 ILR 93.

4 *Jan Mayen Conciliation* (1981) 20 ILM 797.

5 "The International Court of Justice Viewed From the Bench", (1993) 244 *Recueil des Cours* II, 9, especially at 127–155.

6 Panel Reports on US Restrictions on Imports of Tuna (1991) 30 ILM 1598 (USA–Mexico) and (1994) 33 ILM 839 (USA–EC and Netherlands); Appellate Body Report on US Import Prohibition of Certain Shrimp and Shrimp Products (1998) 37 ILM 832. Under the revised dispute settlement procedure agreed in 1994 panel reports are automatically adopted unless the Conference of the Parties decides otherwise by consensus. See A. Porges, "The New Dispute Settlement: From the GATT to the WTO", (1995) 8 *Leiden Journal of International Law* 115.

7 *M/V Saiga Case* (*St Vincent and the Grenadines* v *Guinea*) (1997) ITLOS No. 1.

The modern law of fisheries is defined principally by the 1982 UN Convention on the Law of the Sea,[8] and more recently by the 1995 Agreement on the Conservation of Straddling and Highly Migratory Fish Stocks.[9] These treaties have significantly extended the offshore fishing and conservation rights of coastal states when compared to the 1958 Convention on Fishing and Conservation and the *Icelandic Fisheries Cases* of 1974. They have also placed limits on high seas fishing, both in the interests of sustainable use, and in order to afford greater protection to coastal states whose EEZ fishing is affected by high seas fishing activities. Nevertheless, there continue to be serious international fisheries disputes in many parts of the world, not all of which are necessarily amenable to negotiated solutions.

Along with improvements in the policing of fishing vessels and the need to ensure long-term sustainability of stocks, the availability of adequate compulsory procedures for resolving otherwise intractable disputes remains one of the main challenges of contemporary fisheries law.[10] It is, however, illusory to think that there is at present a satisfactory system in existence. As we shall see, there are immense problems in using existing law to ensure that disputes relating to straddling fish stocks will if necessary be resolved by an independent third party. This has implications not only for the effectiveness of international fisheries law, but also for the ability of governments to negotiate settlements in the event of a dispute with other states. Moreover, without the assurance of authoritative interpretation of the two main treaties, neither of which is easy to interpret, there is inevitably a risk that state practice will fragment, that the treaties themselves will be undermined, and that rights conferred by law will in practice be eroded by uncertainty and argument.[11] It is thus far from clear that existing provision for compulsory dispute settlement can provide solutions for regional disputes.

Evolution

The 1958 Geneva Conventions

The purpose of the four conventions adopted by the First UN Conference on the Law of the Sea (UNCLOS I) at Geneva in 1958 was broadly to codify and develop existing customary law. Little attention was devoted to the settlement of

[8] (1982) 21 ILM 1261.

[9] (1995) 6 *Yearbook of International Environmental Law* 841. Hereafter "Fish Stocks Agreement".

[10] See Agenda 21, Chapter 17, UN, *Report of the UN Conference on Environment and Development*, UN Doc. A/CONF.151/26/Rev.1 (1993), vol. 1, p. 238.

[11] For further development of these arguments, see A.E. Boyle, "Settlement of Disputes Relating to the Law of the Sea and the Environment", (1997) 26 *Thesaurus Acroasium* 299; J. Charney, "The Implications of Expanding International Dispute Settlement Systems: The 1982 Convention on the Law of the Sea", (1996) 90 *American Journal of International Law* 69. See also D. Anderson, "Legal Implications of the Entry into Force of the UN Convention on the Law of the Sea", (1995) 44 *International and Comparative Law Quarterly* 313.

disputes,[12] and, with the exception of fisheries, there was sufficient support only for the adoption of an Optional Protocol Concerning Compulsory Settlement of Disputes.[13] This Protocol allowed any party to refer disputes arising out of the interpretation or application of the four Conventions to the ICJ, unless by agreement the parties resorted to arbitration or conciliation.[14] It was not widely supported, and never had more than 39 parties. Despite the many law of the sea disputes which have subsequently arisen, including those referred to arbitration or adjudication by agreement or under the optional clause in the ICJ Statute, none are known to have been referred to any forum under the Protocol, which remains historically important only for two reasons. First, the relative lack of support reflected the opposition of the Soviet bloc, while in the then newly independent states of the Third World, it was indicative of a reluctance to accept the ICJ as a forum for compulsory jurisdiction. Secondly, the additional provision for arbitration and conciliation, albeit only by agreement, shows an early recognition of the need for a range of alternative forums to suit differing preferences. Both considerations are relevant in understanding the rather different dispute settlement provisions of the LOS Convention.

The 1958 Fisheries Convention proved to be the least successful of the Geneva Conventions, and its dispute settlement provisions have also had no practical use. Although some 36 states became parties to the Fisheries Convention, these never included many of the major coastal fishing states. Articles 9–12 provide for any party to submit disputes concerning the exercise of fishing rights to a special commission of five members,[15] who are intended to be experts "specialising in legal, administrative or scientific questions relating to fisheries, depending upon the nature of the dispute to be settled". Decisions of this commission are by majority vote and are binding on the states party to the dispute. The enforcement powers of the UN Security Council under Article 94(2) of the Charter apply to the commission's decisions. A party may reapply after a reasonable period of at least two years if there have been substantial changes in the stock affecting the factual basis of the award.

The Fisheries Convention is a noteworthy precedent for later UNCLOS negotiations for two reasons. First, resort to the special commission is compulsory unless the parties agree otherwise. This was probably an essential

[12] Convention on the Territorial Sea and Contiguous Zone, 516 UNTS 205, in force 10 September 1964; Convention on the High Seas, 450 UNTS 82, in force 30 September 1962; Convention on Fishing and Conservation of Living Resources of the High Seas, 559 UNTS 285, in force 20 March 1966; Convention on the Continental Shelf, 499 UNTS 311, in force 10 June 1964.

[13] Optional Protocol of Signature Concerning the Compulsory Settlement of Disputes, 450 UNTS 169, in force 30 September 1962.

[14] Art. 73 of the draft Convention proposed by the International Law Commission required compulsory judicial settlement only in respect of the continental shelf. See "Report of the ILC to the General Assembly" in *Yearbook of the International Law Commission* (1956), vol. II, p. 253, and compare "Report of the Special Rapporteur" in *ibid.*, p. 3, at paras. 19–23.

[15] Compare Art. 57 of the ILC's draft Convention, note 14 above.

element in a delicate balance of interests without which agreement on extending the powers of coastal states over high seas activities would probably have been impossible. The self-evident purpose of Articles 9–12 is to restrain abuse of power by coastal states, while also providing for some check on the unreasonable exercise of high seas fishing freedoms by other states. Secondly, the choice of a special commission of fisheries experts, rather than the ICJ or general arbitration, is significant. It reflects a sensible perception that courts and lawyers do not necessarily have all the expertise required for every type of law of the sea dispute. The preference in this case for a functionalist approach to the choice and composition of dispute settlement bodies again shows the need for a range of alternative forums. These two issues – the scope of compulsory settlement and the adaptation of dispute settlement institutions to different functions – became probably the most important matters which had to be resolved in drafting Part XV of the LOS Convention text.

The UN Committee on Peaceful Uses of the Seabed and Ocean Floor Beyond the Limits of National Jurisdiction

In 1968 the UN General Assembly established a Seabed Committee to consider proposals for revising the existing law of the sea.[16] Whether these revisions would be confined to sea-bed issues, as Western states hoped, or would deal more comprehensively with the law of the sea, as many developing states sought, was ultimately resolved in the latter's favour, and resulted, in 1973, in the opening of the UNCLOS III negotiations. Many of the issues discussed at UNCLOS received a preliminary airing in the Seabed Committee, however, including dispute settlement. At the 26th Session of that Committee the UK made proposals for elements of a convention on the deep sea-bed, including creation of a specialised tribunal with jurisdiction over interpretation, the terms of licences and the boundaries of allocated areas.[17] The members would be lawyers or specialists in sea-bed operations, and the tribunal might either adjudicate or conciliate. At the 28th Session the USA put forward draft Articles for a chapter on dispute settlement which expanded on the UK's position.[18] The USA proposed compulsory jurisdiction for a tribunal on matters to be agreed: it would consist of lawyers but sit with technical assessors in cases concerning navigation, pollution, fishing and so on. The tribunal's decisions would be binding. There would be provision for urgent cases, and a procedure for owners or operators of detained vessels to seek prompt release. These proposals proved controversial but influential and they formed the initial basis for discussion at the 1974 Session

[16] See Report of the Committee on the Peaceful Uses of the Seabed etc., GAOR, 26th Session, Supplement No. 21.
[17] *Ibid.*, vol. III, pp. 83–91.
[18] *Ibid.*, vol. V, UN Doc. A/AC.138/97 (1973).

of the Conference.[19] Their basic points – provision for compulsory jurisdiction, and a specialised tribunal – remain intact in the Convention as finally agreed, despite much elaboration and many subsequent changes.

The LOS Convention Dispute Settlement Scheme

The main object of the LOS Convention's scheme[20] for compulsory jurisdiction is to guarantee the integrity of the Convention and to act as a restraint or moderating influence on the excessive claims and tensions likely to arise over time. During the UNCLOS negotiations it became clear that in order to achieve the widest possible consensus on dispute settlement provisions which would be an integral part of the Convention, rather than an optional extra as in 1958, considerable flexibility in the choice of procedures would be essential. Three basic elements emerged in the final agreement. First, parties to a dispute would remain free in principle to agree on whatever method of dispute settlement they preferred and only in default of agreement would there be unilateral, binding, compulsory settlement. Secondly, states would be allowed the maximum possible choice of procedures, both to accommodate different types of dispute, and the differing views of states on what they would accept.[21] This meant, in particular, that judicial settlement could not be the only or even the primary forum, as it had been in 1958. As Adede observes:

[19] A.O. Adede, *The System for Settlement of Disputes Under the UN Convention on the Law of the Sea* (Dordrecht, 1987), p. 13.

[20] See generally J. Merrills, *International Dispute Settlement* (Cambridge, 2nd ed., 1991), chapter 8; R. Churchill and A.V. Lowe, *The Law of the Sea* (Manchester, 2nd ed., 1988), chapter 19; L. Sohn, "Settlement of Law of the Sea Disputes", (1995) 10 *International Journal of Marine and Coastal Law* 205; A. Adede, *The System for Settlement of Disputes Under the UNCLOS* (Dordrecht, 1987); J.P.A. Bernhardt, "Compulsory Dispute Settlement in the Law of the Sea Negotiations: A Reassessment", (1978) 19 *Virginia Journal of International Law* 69; J. Charney, "Entry Into Force of the 1982 UNCLOS", (1995) 35 *Virginia Journal of International Law* 381; G. Lehoux, "La Troisième Conférence sur le droit de la Mer et le Règlement Obligatore des Différends", (1980) 18 *Canadian Yearbook of International Law* 31; S. Rosenne and A. Soons (eds.), *UN Convention on the Law of the Sea 1987: A Commentary* (Dordrecht, 1988), vol. 5, P.W. Birnie, "Dispute Settlement Procedures in the 1982 UNCLOS", in W.E. Butler (ed.), *The Law of the Sea and International Shipping: Anglo-Soviet Post UNCLOS Perspectives* (New York, 1985), p. 39; Gaertner, "The Dispute Settlement Provisions of the Convention on the Law of the Sea: Critique and Alternatives to the ITLOS", (1982) 19 *San Diego Law Review* 577, G. Jaenicke, "Dispute Settlement Under the Convention on the Law of the Sea", (1983) 43 *ZaöRV* 813; A.L. de Mestral, "Compulsory Dispute Settlement in the 3rd UNCLOS: A Canadian Perspective", in T. Burgenthal (ed.), *Contemporary Issues in International Law* (Kehl, 1984), p. 169; E.D. Brown, "Dispute Settlement and the Law of the Sea: The UN Convention Regime", (1997) 21 *Marine Policy* 17; and C. Chinkin, "Dispute Resolution and the Law of the Sea: Regional Problems and Prospects", in J. Crawford and D. Rothwell (eds.), *The Law of the Sea in the Asian Pacific Region* (Dordrecht, 1995), p. 237.

[21] A.O. Adede, *The System for Settlement of Disputes*, pp. 242*ff*, A.O. Adede, "Settlement of Disputes Arising Under the Law of the Sea Convention", (1975) 69 *American Journal of International Law* 798; and L. Sohn, "Settlement of Law of the Sea Disputes", (1995) 10 *International Journal of Marine and Coastal Law* 205.

> "the approach of offering states a cafeteria of modes of settlement ranging from the informal and non-binding procedures to the formal and binding procedures remained the central theme."[22]

Thus, compulsory jurisdiction would be exercisable not by the ICJ alone but by a range of fora, including a new specialist court, among which the parties would again have the right to choose.

Lastly, while it was intended that the procedures available should as far as possible be comprehensive as regards parties and issues, agreement was only possible at the price of significant exclusions from compulsory jurisdiction which make that part of the system less than fully comprehensive.

What is remarkable about the system as a whole is that agreement was reached at all, given the very divergent views among different groups of states on dispute settlement issues generally. No comparable agreement had been achieved up to then in other contexts, including the 1969 Vienna Convention on the Law of Treaties, nor has anything quite so extensive been agreed since.

Freedom to Choose the Method of Settlement

Fundamentally, the parties to the LOS Convention are free to settle their disputes by any peaceful means of their choice (Arts. 279–284). Nothing compels them to go to court, or to arbitrate, if they can agree on some other method. For this reason Article 283 requires all parties to a dispute to exchange views as a preliminary to any further steps, while Article 284 allows any party to invite the other to seek conciliation before invoking any other procedure. Informal resolution of any dispute is thus still possible if that is what the parties want.

Moreover, if the states concerned are parties to another agreement entailing compulsory binding settlement of the dispute, "that procedure shall apply in lieu of the procedures provided for in [Part XV of the LOS Convention], unless the parties to the dispute otherwise agree" (Art. 282). Thus two states which have made declarations in similar terms under Article 36(2) of the ICJ Statute will remain subject to the compulsory jurisdiction of the ICJ even in the LOS Convention cases.[23] Similarly, parties to the MARPOL Convention continue to be subject to compulsory arbitration under Article 10 of that Convention unless they can agree otherwise.

For these various reasons the LOS Convention's provisions on compulsory dispute settlement are essentially residual: the principle of binding compulsory

[22] *The System for Settlement of Disputes*, p. 247.

[23] See T. Treves, "Aspects of the Relationship Between the Jurisdiction of the ITLOS and the ICJ", in ASIL/NVLR, *Contemporary International Law Issues: Conflicts and Convergence* (The Hague, 1996), p. 308. The 1958 Optional Protocol would presumably not apply in lieu of Part XV, however, because of Art. 311(1), under which the LOS Convention prevails over the 1958 Conventions.

settlement only applies if the parties have not been able to settle the dispute by conciliation or other agreed means.

Choice of Forum for Compulsory Jurisdiction

There were several reasons for the failure to secure agreement on a single forum for exercising compulsory jurisdiction. Some states, including the Soviet bloc and many developing states, were reluctant either to accept the principle of judicial settlement, or to allow the ICJ to be the sole or principal forum. Some of these states sought the creation of a new tribunal. Others argued that no single forum would be appropriate for the whole range of issues likely to arise and that provision should be made for specialist bodies, not necessarily composed of lawyers, to deal with the more technical matters.[24]

The eventual compromise, embodied in the so-called Montreux formula of Article 287, attempted to satisfy all of these arguments by creating a new tribunal, the International Tribunal for Law of the Sea (ITLOS), while allowing the parties to choose the most appropriate or acceptable forum from four possibilities, each of which would enjoy compulsory jurisdiction:

- the ICJ;
- ITLOS;
- arbitration; and
- special arbitration.

The composition of these bodies reflects differences in their intended functions. Whereas ITLOS will be composed of persons of "recognised competence in the field of the Law of the Sea"[25] – and will function as an alternative to the ICJ – arbitrators appointed under Annex VII need not be lawyers but must be "experienced in maritime affairs". Special arbitrators appointed under Annex VIII similarly do not have to be lawyers, but will instead be persons selected for their expertise in the four areas for which special arbitration is available: fisheries, protection of the marine environment, scientific research, or navigation. The FAO, UNEP, the IOC and the IMO will maintain lists of appropriate experts in these fields. Experts appointed to sit with the ICJ, ITLOS or an arbitral tribunal in accordance with Article 289 are also "preferably" to be chosen from the list of special arbitrators.

It is thus possible within the LOS Convention scheme to tailor the choice of tribunal to the characteristics of each dispute, and to bring in technical expertise where necessary: the Convention certainly cannot be characterised as favouring adjudication by lawyers in all cases. This has important implications for fisheries and environmental disputes, and does demonstrate that these could be handled

[24] See A.O. Adede, *The System for Settlement of Disputes*, pp. 242*ff*; and L. Sohn, "Settlement of Law of the Sea Disputes", (1995) 10 *International Journal of Marine and Coastal Law* 205.
[25] Annex VI, Art. 2.

within the Convention's scheme even where they involve mainly technical, or a mix of legal and technical, issues. In such cases resort to special arbitration, or the appointment of experts to sit with judicial or arbitral tribunals, may be the most appropriate way of ensuring that the right fisheries, scientific or environmental expertise is applied to deciding the dispute.

While special arbitrators possess only a limited and specific jurisdiction, the Convention does not try to allocate a specific functional jurisdiction to each of the four compulsory fora.[26] Rather, as we have seen above, it leaves the choice of forum to the parties to the dispute, and gives them the freedom to select whichever they deem most suitable. Fisheries disputes could thus be taken to any of the four dispute settlement options provided by the Convention, and in this respect the LOS Convention is fundamentally different from the scheme for compulsory settlement found in the 1958 Fisheries Convention and described earlier. Where the parties cannot agree on the choice, arbitration under Annex VII becomes the residual forum for the exercise of compulsory jurisdiction in all cases, including fisheries disputes.[27] Under Article 287, parties to the Convention may also make a declaration accepting in advance the compulsory jurisdiction of one or more of the four fora: this declaration will determine which body has compulsory jurisdiction only in relation to other states making the same choice. Where the parties to a dispute have declared their acceptance of different fora, or have made no declaration, arbitration is again the residual forum. In practice very few of the parties have made such a declaration; so, by default, arbitration is at present the nominal preference of most states.[28]

Binding Compulsory Settlement

In making provision for compulsory settlement of disputes an integral part of the LOS Convention, the parties went further than had been possible in the earlier 1958 Geneva Conventions. In principle, questions of interpretation and application of the Convention are subject to compulsory jurisdiction under Article 288(1). However, there was no consensus on bringing all of the

[26] The exception to this proposition is the allocation of deep sea-bed disputes to the Seabed Disputes Chamber of ITLOS under Part XI of the Convention.

[27] Art. 287(3) and (5).

[28] As of March 1998, the following states had made declarations accepting compulsory jurisdiction as follows: Argentina (ITLOS and Special Arbitration); Austria (ITLOS, Special Arbitration and ICJ); Cape Verde (ITLOS and ICJ); Chile (ITLOS and Special Arbitration); Egypt (Arbitration); Finland (ICJ and ITLOS); Germany (ITLOS, Special Arbitration and ICJ); Greece (ITLOS); Italy (ICJ and ITLOS); Netherlands (ICJ); Norway (ICJ); Oman (ITLOS and ICJ); Portugal (ITLOS, ICJ, Arbitration and Special Arbitration); Spain (ICJ); Sweden (ICJ); Tanzania (ITLOS); UK (ICJ); and Uruguay (ITLOS). See Sohn, note 20 above; and E.D. Brown, note 20 above. For a fuller analysis of the complexities of Art. 287, see T. Treves, "Aspects of the Relationship Between the Jurisdiction of the ITLOS and the ICJ", in ASIL/NVIR, *Contemporary International Law Issues: Conflicts and Convergence* (The Hague, 1996), p. 305.

Convention's provisions within compulsory jurisdiction. The most significant exclusion involves the exercise of jurisdiction over fisheries or marine scientific research in the exclusive economic zone.[29] States also have the option of excluding disputes concerning equitable delimitation of their territorial sea, EEZ or continental shelf boundaries, or historic bays and titles.[30] In general terms questions of *entitlement* to maritime zones fall within compulsory jurisdiction, while equitable *delimitation* can be excluded.

The effect of these various exclusions is to categorise and separate different kinds of dispute, some of which will lead to binding compulsory settlement, others of which will not. With the exception of sea-bed disputes, for which a special tribunal is created with exclusive jurisdiction,[31] these categorisations do not have a functional basis. The excluded matters are not treated differently because some other way of dealing with them is more appropriate, although sometimes this may be the case, but because they concern subjects which proved politically sensitive and where many of the rules are open-textured and flexible, such as delimitation based on equitable principles. The reluctance of some states to commit themselves to binding settlement in these cases was strong and understandable, particularly with regard to fisheries and boundaries, but it does seriously diminish the overall integrity of the Convention.

Exclusion of EEZ Fisheries Disputes

EEZ disputes in general present the most complex problems for compulsory jurisdiction under the LOS Convention. The practical effect of Article 297 is that there will usually be binding compulsory settlement for those EEZ disputes which relate to navigation or protection of the environment, but not for disputes which relate to the coastal state's exercise of its discretionary powers over fishing and marine scientific research within the EEZ. To complicate matters further, some, but not all, fisheries disputes excluded from binding compulsory settlement are subject instead to non-binding compulsory conciliation. Finally, under Article 298 states have the option of excluding from compulsory settlement certain disputes concerning law enforcement in the EEZ in regard to fisheries or scientific research.

The inclusion of navigation and protection of the environment within compulsory settlement was intended to restrain coastal state claims to "creeping jurisdiction" over shipping within the EEZ, and it reinforces a balance established by Parts V and XII in favour of freedom of navigation.[32] But the exclusions from binding compulsory settlement are also far-reaching and significant and do little for the already limited claims of states to fish or conduct

[29] Arts. 297(2) and (3) and 298(1)(b).
[30] Art. 298(1)(a).
[31] See note 26 above.
[32] See P.W. Birnie and A.E. Boyle, *International Law and the Environment* (Oxford, 1992), chapter 7.

research in the EEZ of another state. Such rights for other states as are afforded by Articles 62, 69, 70 and 246 are exercisable only by agreement and, in the case of fishing, only on heavily qualified terms involving subjective judgments by the coastal state about conservation, harvesting capacity and total allowable catch. Yet fisheries disputes arising under these Articles are excluded from compulsory jurisdiction of a court or tribunal when they are concerned with the sovereign rights of coastal states over living resources in the EEZ (Art. 297(3)(a)). These sovereign rights include the determination of harvesting capacity and total allowable catch, the allocation of a surplus, and the regulation of conservation and management of EEZ stocks.[33]

Disputes concerning EEZ stocks excluded from compulsory binding settlement by Article 297(3)(a) are subject in a limited range of cases to compulsory conciliation. However, this is required only if the coastal state has "manifestly" failed to ensure proper conservation and management of EEZ stocks or has "arbitrarily" refused to determine an EEZ surplus or allocate it to any state (Art. 297(3)(b)). The terminology suggests that what is taken out of compulsory jurisdiction by Article 297(3)(a) is not necessarily put back into compulsory conciliation by Article 297(3)(b). Moreover, it seems reasonably clear that conciliation is intended to deal mainly with issues of third party access to the EEZ, rather than with the management of straddling stocks. Even if that is not correct, it affords a remedy only in extreme cases of manifest or arbitrary abuse.

The dispute settlement provisions for the EEZ reflect the reality that the management of resources within the EEZ is very much a matter for coastal state discretion,[34] a point reinforced by Article 297(2)(b) and (3)(c) which respectively prohibit a conciliation commission from questioning a coastal state's decisions on third party access to the EEZ for research purposes, or from substituting its own discretion for that of the coastal state in regard to conservation and management of or access to EEZ fish stocks. Coastal states at the UNCLOS negotiations were not willing to subject their new-found EEZ rights to international accountability, and the exclusions from binding compulsory jurisdiction were deliberate and necessary in the interests of consensus. They leave unanswered the difficult question whether disputes concerning straddling stocks – that is, stocks which straddle both the high seas and EEZ waters – are within or outside the exclusion from compulsory binding settlement.

There is no doubt that disputes relating only to high seas fisheries and research are within the Convention's provisions on binding compulsory settlement. Thus, as regards fish, the initial question is whether the dispute involves high seas

[33] Arts. 61–70. It is assumed here that these articles of UNCLOS will apply *mutatis mutandis* to the exercise of sovereign rights within an exclusive fishing zone.

[34] See Arts. 55–75 and 238–262; W.T. Burke, *The New International Law of Fisheries* (Oxford, 1994), pp. 59–80; B. Kwiatkowska, *The 200 Mile EEZ in the New Law of the Sea* (Dordrecht, 1989); D. Attard, *The Exclusive Economic Zone* (Oxford, 1987); and F. Orrego Vicuña, *The Exclusive Economic Zone* (Cambridge, 1989).

freedoms or coastal state sovereign rights in the EEZ. But what if it involves both? Most of the more intractable fisheries disputes occur because the stocks in question straddle two or more EEZs, or straddle the EEZ and the high seas.[35] This is particularly true in the north-west Atlantic and the north Pacific/Bering Sea. In these areas it makes little sense to separate the question of high seas fishing from the management of fish stocks in the adjacent EEZ. Over-fishing or poor management in one area will necessarily have an impact on the other, as can be observed in the Canada–Spain dispute. While Canada arguably had a good case for complaint with regard to fishing of the high seas by Spain and other EU states, and such a dispute is subject to compulsory settlement, Canada has also accepted that its own management of the Canadian EEZ has resulted in over-fishing.[36] What needs to be established is whether this EEZ aspect of the dispute is also susceptible to compulsory binding settlement under the Convention.

It has been argued that Article 297(3)(a) should be narrowly construed to exclude only disputes concerning stocks which exist wholly within the EEZ of one or more states, that is, exclusive or shared stocks.[37] If this is correct, then disputes involving stocks which straddle the EEZ and the high seas would remain fully within compulsory jurisdiction, even if the dispute related to the exercise of coastal state sovereign rights. The argument in favour of this interpretation is that only then could a court deal with the stock as a whole; it cannot do so if compulsory jurisdiction applies only to the actions of states fishing the high seas but not to coastal state EEZ management of the same stock. But the same could be said of shared stocks which merely straddle several EEZs. In both cases inclusion within compulsory jurisdiction is difficult to reconcile with the explicit wording of Article 297(3)(a), which provides that "the coastal state shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone, or their exercise". It is far from clear that the word "in" can be narrowly construed so as to apply only to stocks which never venture beyond any EEZ, even if it is possible to identify fish with this characteristic. Nor is it evident that what may be a sensible and desirable interpretation of this Article in fact reflects the intention of parties to the UNCLOS negotiations. It is at least as plausible to

[35] See E. Meltzer, "Global Overview of Straddling and Highly Migratory Fish Stocks: The Non-Sustainable Nature of High Seas Fisheries", (1994) 25 *Ocean Development and International Law* 255; W.T. Burke, *The New International Law of Fisheries* (Oxford, 1994); and G. Ulfstein, P. Andersen and R. Churchill, *The Regulation of Fisheries: Legal, Economic and Social Aspects* (Council of Europe, 1986).

[36] In 1995 Canada and the European Community concluded an Agreed Minute on the Conservation and Management of Fish Stocks: see 34 ILM 1260 and P. Davies, "EC–Canada Fisheries Dispute", (1995) 44 *International and Comparative Law Quarterly* 927. The dispute between Spain and Canada concerning the arrest of the trawler *Estai* on the high seas is currently before the ICJ.

[37] E.D. Brown, *The International Law of the Sea* (Aldershot, 1994), vol. 1, p. 228.

assume that coastal states did not want there to be compulsory jurisdiction in respect of their obligations regarding straddling stocks. The conclusion may be undesirable but the interpretation is neither absurd nor unreasonable.[38] However, for reasons considered in the next two sections, it would be unwise to draw any firm conclusion on this point at present. What can be observed is that neither the text of the Convention nor the negotiating records of UNCLOS III provide definitive support for either view. Nor, as we shall see below, does the 1995 Fish Stocks Agreement fully resolve the dilemma, since it refers the issue back to the disputes settlement provisions of Part XV of the LOS Convention.

If disputes concerning shared or straddling stocks are indeed excluded from compulsory binding settlement then the parties are left with two options:

- make an *agreed* submission of all the issues in dispute to a tribunal of their choice; or
- submit only the high seas issues to compulsory settlement.

The weakness of the former is precisely that it requires agreement, and of the latter that it fails to deal comprehensively with the dispute and is almost bound to fail for that reason. Moreover, there is manifest inequity in subjecting to compulsory jurisdiction states whose vessels fish on the high seas while at the same time denying these states the right to bring proceedings or counter-claims against a coastal state whose own actions may be affecting the very same straddling stock. This lack of equivalence in the due process rights of high seas and coastal states may well justify a tribunal refusing on equitable grounds to entertain claims brought by coastal states unless they are willing to agree to jurisdiction over any counter-claim made by the respondent high seas state with regard to the straddling stock in dispute.[39] The inherent inequity may be simply another manifestation of the unsatisfactory nature of the Convention's treatment of fisheries, but that is little consolation for those high seas fishing states whose interests are most affected.

Exclusion of Disputes Concerning Maritime Boundaries: Fishery Zones and EEZs

Here the position regarding compulsory jurisdiction is also complex, and directly relevant to fishing. Insofar as they involve questions of interpretation or application of the LOS Convention, maritime boundary disputes are in principle

[38] See the account of the negotiation of Art. 297 in M. Nordquist (ed.), *UNCLOS Commentary* (Dordrecht, 1991), vol. v, pp. 85–106.

[39] On the basis that it is inequitable for one state to claim rights against another while refusing to accord the same rights to the other state. See *Diversion of the Waters of the Meuse* (1937) PCIJ Series A/B No. 70, p. 25, on which see B. Cheng, *General Principles of Law as Applied by International Tribunals* (London, 1953), pp. 142–143. Alternatively, a court may have compulsory jurisdiction over any counterclaim arising out of the same facts as the principal claim: see ICJ order in respect of Yugoslavia's counterclaim in the Bosnian Genocide Case.

subject to compulsory binding settlement. Thus a dispute about the *entitlement* of islands to a shelf or EEZ under Article 121(3)[40] would be subject to compulsory settlement. However, Article 298 allows states to make a declaration opting out of one or more of the four compulsory procedures with respect to disputes which concern *equitable delimitation* of the territorial sea, EEZ or continental shelf, or which involve historic bays or titles. Where this right to opt out is exercised, an obligation arises to submit delimitation disputes arising after entry into force of the Convention to non-binding conciliation unless they necessarily involve disputed sovereignty over islands or land territory, when no compulsory process of any kind is required. Thus the first problem is simply that some states will and others will not be subject to compulsory jurisdiction in boundary delimitation disputes, but that is no worse than the present position under general international law.

The second problem arises from the combination of Articles 297 and 298. Take a dispute involving possible EEZ claims around islands or rocks where sovereignty is unsettled, such as Rockall, the Senkaku/Diaoyutai Islands or Takeshima/Tokdo. Suppose a claimant state purports to exercise fisheries jurisdiction within this EEZ. How do we categorise such a dispute? Does it relate to the exercise of sovereign rights and law enforcement within the EEZ, which is excluded under Articles 297 and 298 from compulsory jurisdiction? Is it a maritime delimitation dispute concerning the interpretation or application of Article 74 and excluded from binding compulsory jurisdiction under Article 298 if one of the parties has opted out under that Article? Does it necessarily involve disputed sovereignty over land territory so that even compulsory conciliation can be excluded? Or is it a dispute about entitlement to an EEZ under Part V and Article 121(3) of the Convention? If it is the latter, then it is not excluded from compulsory jurisdiction under either Article 297 or Article 298. Much may thus depend on how the dispute is formulated. If it is presented as misuse of fisheries jurisdiction powers within the EEZ, then it will surely be excluded under Article 297. But if it is an invalid claim to an EEZ contrary to Article 121(3) then it would appear not to be excluded. Then suppose, instead, that it is reformulated as a claim that on equitable grounds the island or rock should be given no weight as a basepoint in a delimitation under Article 74?[41] *Prima facie* this appears to be caught by Article 298(1). It is not necessary for present purposes to answer all of

[40] See B. Kwiatkowska and A.H. Soons, "Entitlement to Maritime Areas of Rocks which Cannot Sustain Human Habitation or Economic Life of their Own", (1990) 21 *Netherlands Yearbook of International Law* 139; E.D. Brown, "Rockall and the Limits of National Jurisdiction of the UK", (1978) 2 *Marine Policy* 181; and E.D. Brown, *The International Law of the Sea* (1994), vol. 1, p. 150.

[41] On the effect of islands in maritime delimitations, see *North Sea Continental Shelf Case* (1969) ICJ Rep 3, para. 57; *Channel Arbitration* (1978) Cmnd 7438; *Gulf of Maine Case* (1984) ICJ Rep 246, para. 201; *Dubai–Sharjah Boundary Award* (1981) 91 ILR 543; *Guinea Guinea Bissau Arbitration* (1985) 25 ILM 251, para. 97; *Tunisia–Malta Continental Shelf Case* (1982) ICJ Rep 18, para. 104; and *Jan Mayen Case* (1993) ICJ Rep 38, para. 80.

these questions,[42] but they should suffice to show that everything turns in practice not on what each case involves, but on how the issues are characterised. Formulate them wrongly and the case falls outside compulsory jurisdiction. Formulate the same case differently, and it falls inside. The important question for disputes concerning straddling fish stocks then becomes whether the applicant state's characterisation is decisive, or whether the forum before which the dispute is brought can make its own characterisation.

Characterisation of LOS Convention Disputes in Practice: The Saiga Case

In the *Saiga* case,[43] the first before ITLOS, the tribunal held by a majority that the arrest of an oil tanker supplying bunker fuel to fishing vessels in the exclusive economic zone of Guinea could *arguably* be characterised as a fishing dispute for the purpose of jurisdiction to order prompt release of the vessel under Article 73 of the Convention. It did so in spite of the fact that Guinea, the arresting state, had made the arrest not for a violation of its fisheries law but for alleged violation of its customs laws. The Convention provides for prompt release in the case of fisheries offences but not for customs offences. At the same time it also confers no jurisdiction to apply customs laws in the EEZ or to make arrests for such offences beyond the contiguous zone. The tribunal's characterisation of the case as a fisheries dispute is not the last word on the matter, because it decided only that this characterisation was plausible, not that it was correct. The minority judges held that the court had applied the wrong test and should have concluded that the dispute was not a fisheries case for the purposes of Article 73. Unlike the majority they would have given Guinea's own characterisation of its actions decisive weight. On a subsequent application for provisional measures,[44] however, the tribunal again rejected Guinea's characterisation of the case, this time as an EEZ fisheries dispute excluded from compulsory jurisdiction by virtue of Articles 297(3) and 298(1)(b), and held instead that for the purpose of jurisdiction to prescribe provisional measures the case appeared *prima facie* to fall within compulsory jurisdiction under Article 297(1).

Both decisions may illustrate no more than the tendency of courts to make interpretations fit the result they wish to reach. On this view what constitutes a fisheries dispute will vary according to the context in which the question arises and there is no necessary illogicality in characterising a dispute as a fisheries case for prompt release applications but as something else when compulsory jurisdiction is in issue. Such procrustean tendencies may enable a court to do

[42] See further A.E. Boyle, "UNCLOS, ITLOS and the Settlement of Maritime Boundary Disputes Between Taiwan and Japan", in Taiwan Institute of International Law (ed.), *Dispute over Diayou-Senkaku* (Taipei, 1997), pp. 143–162.

[43] *M/V Saiga Case* (*St Vincent and the Grenadines* v *Guinea*) (1997) ITLOS No. 1. See A.V Lowe, "The M/V Saiga: The First Case in the International Tribunal for the Law of the Sea", (1999) 48 *International and Comparative Law Quarterly*.

[44] *M/V Saiga (No. 2)* (*St Vincent and the Grenadines* v *Guinea*) (1998) ITLOS No. 2.

justice in the instant case, but only at some cost in integrity, consistency and predictability.[45] Orderly relations among states are not necessarily assisted thereby, while in the context of disputes over straddling fish stocks the uncertainty regarding the proper characterisation for the purposes of Part XV of the LOS Convention is not removed.

What does seem clear from the evidence of both *Saiga* cases is that characterisation of the issues in dispute will be decided by the court or tribunal hearing the case, rather than by the parties to the dispute. It follows that in practice, given the textual uncertainty inherent in the LOS Convention and the 1995 Fish Stocks Agreement, and the power of interpretation and appreciation exercisable by a court or tribunal in such cases, the question whether disputes concerning the relationship between conservation and management of straddling or highly migratory fish stocks on the high seas and within the EEZ falls fully within compulsory binding dispute settlement is essentially one to which there is no definitive answer. If a court or tribunal wants to establish that compulsory jurisdiction exists in such cases, even at the cost of some intrusion on coastal state sovereign rights, it appears possible for it to do so.

Inclusion of Disputes Concerning Related Agreements

Article 288(2) also brings within the jurisdiction of a court or tribunal any dispute concerning interpretation or application of any other international agreement "related to the purposes of the Convention" and submitted "in accordance with the agreement".[46] Quite what this Article means is not free from doubt. From one view it permits the parties to other agreements to incorporate the LOS Convention's dispute settlement regime. Only two such "related agreements" appear at present to meet this interpretation. First, Article 30 of the 1995 Fish Stocks Agreement applies Part XV *mutatis mutandis* to disputes concerning interpretation and application of that Agreement or of any subregional, regional or global fisheries agreement relating to straddling or highly migratory fish stocks, although, as we have seen, most aspects of EEZ fisheries management are taken out of compulsory jurisdiction by Article 297(3). Secondly, Article 2 of the 1994 Agreement on the Implementation of Part XI of the LOS Convention[47] provides for the LOS Convention and the 1994 Agreement to be read as a single instrument and by implication would thus seem to import the compulsory dispute settlement procedures of Part XI.

A broader reading of Article 288(2) is that it covers any agreement which makes provision for binding decision by a court or tribunal. Would this cover

[45] See Lowe, note 43 above.
[46] On the drafting of this Article, see Nordquist, note 38 above at pp. 46–48.
[47] 1994 Agreement Relating to the Implementation of Part XI of the UNCLOS 1982, (1994) 33 ILM 1311. See D.H. Anderson, "Further Efforts to Ensure Universal Participation in the UNCLOS", (1994) 43 *International and Comparative Law Quarterly* 886; J. Charney, "Entry into Force of the 1982 UNCLOS", (1995) 35 *Virginia Journal of International Law* 381.

treaties, such as the 1973/78 MARPOL Convention[48] and the 1996 Dumping Protocol,[49] which provide for compulsory arbitration, but where resort to any other forum requires agreement of the parties? If Article 288(2) applies to other treaties only insofar as they envisage compulsory settlement then it would cover only cases of compulsory arbitration under MARPOL or the Dumping Protocol. The problem with this interpretation is that, as we saw earlier, Article 282 provides that treaties which have their own procedure for binding dispute settlement take priority over Part XV of the LOS Convention unless the parties agree otherwise, so Article 288(2) would not operate in these cases. Alternatively, if it applies to cases of agreed submission by both parties, then it would not be true to call jurisdiction under Article 288(2) a "compulsory procedure". It is of course always open to the parties to a dispute arising under these earlier agreements to agree to use the LOS Convention's procedures under Article 282. Whatever the correct interpretation, a treaty which makes no provision for compulsory binding jurisdiction is not transformed by Article 288(2) into one which does. Article 288 thus does little or nothing to extend the scope of compulsory jurisdiction over straddling stock disputes. As we shall see below, however, the 1995 Fish Stocks Agreement adopts a very different position. Unlike Article 288, it does import compulsory jurisdiction into other related fisheries agreements and in this respect has a very considerable impact on the practical scope of compulsory jurisdiction in fisheries cases.[50]

Compulsory and Consensual Jurisdiction: The Reality of the LOS Convention

From what we have seen so far the reality of the LOS Convention is that its provision for compulsory binding settlement of disputes is less impressive and comprehensive than it might seem at first sight. The most significant areas where the commitment to compulsory settlement is unequivocal are freedom of navigation and protection of the marine environment.[51] The former is consistent with the Convention's general treatment of navigation interests and the strong lobbying of the maritime powers. The latter remains a novelty among even the most ambitious of environmental treaties, where compulsory conciliation and optional acceptance of binding adjudication are usually the most the parties are prepared to agree on.[52] However, the main reason for such a strong regime in this Convention is the need to protect navigation from excessive interference on

[48] IMO, *MARPOL 1973/78 Consolidated Edition* (1992).

[49] The 1996 Protocol which replaces the 1972 Convention provides for compulsory arbitration, or, if the parties agree, for reference to any of the procedures listed in Art. 287(1) of the LOS Convention. See (1997) 26 ILM 7, Art. 16.

[50] See pp. 22–23 below.

[51] Art. 297(1).

[52] See e.g. 1992 Framework Convention on Climate Change, Art. 14; 1992 Convention on Biological Diversity, Art. 27; and 1985 Convention for the Protection of the Ozone Layer, Art. 11.

environmental grounds by coastal states, so this novelty is perhaps also less than it seems.

Elsewhere, and especially on those issues where disputes have been most numerous – fisheries and boundaries – we can see that the fragmentation resulting from the partial exclusion of these issues leaves a largely empty shell which can be filled only if the parties agree on consensual submission of the dispute to whatever forum they choose.[53] This does not mean that there will be no cases on the Convention before international tribunals – all of the arbitrations and most of the ICJ cases which have dealt with law of the sea issues until now have been cases of consensual, not compulsory, jurisdiction. Rather, it does remind us not to exaggerate the significance of compulsory jurisdiction in the judicial settlement of disputes.

As we saw above, Article 280 emphasises the freedom of parties to agree at any time to settle a dispute concerning the Convention by any peaceful means of their own choice, while Article 299 preserves the right of the parties to agree to submit to the Convention's procedures matters otherwise excluded from compulsory jurisdiction by Articles 297 or 298. In practice, because of these Articles, it is quite likely that many fisheries and boundary disputes will have to be or will be more satisfactorily dealt with by consent before ITLOS or some other forum rather than under compulsory jurisdiction.[54] Article 21 of the Statute of ITLOS should be sufficient to enable the parties to refer any dispute concerning the LOS Convention and related agreements to the ITLOS, including those which fall wholly or partly outside the provisions on compulsory jurisdiction. Moreover, Article 22 of the Statute also allows all of the parties to treaties already in force and which concern the subject matter of the LOS Convention to submit disputes arising under these treaties to ITLOS by agreement. Happily this Article poses none of the interpretation difficulties which affect Article 288(2), and there is no reason to doubt that it would cover the 1996 Dumping Protocol and the 1973/78 MARPOL Convention, as well as any fishery treaty. Both the 1995 Fish Stocks Agreement and the 1993 Agreement on Compliance by Fishing Vessels also allow the parties by agreement to refer disputes to ITLOS, the ICJ or arbitration.[55]

[53] See also A.E. Boyle, "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction", (1997) 46 *International and Comparative Law Quarterly* 37, from which parts of this article are drawn.

[54] *Ibid.*

[55] Art. 9 of the Agreement to Promote Compliance with International Conservation and Management Measures by Vessels on the High Seas. The possibility of consensual references under the 1995 Fish Stocks Agreement would seem to be implicit in Arts. 27–32 of that Agreement. On the 1996 Protocol to the London Dumping Convention, see note 49 above.

Settlement of Disputes Under the 1995 Fish Stocks Agreement

The 1995 Fish Stocks Agreement represents an attempt to deal with the serious problems of over-fishing of EEZ and high seas stocks which had emerged in the period since adoption of the LOS Convention and the development of the 200-mile exclusive economic zone. In addition, it provides a new global framework for the regulation and management of highly migratory fish stocks. The Agreement is in many respects radical in its reform of international fisheries law: it introduces obligations of sustainable use, requires the precautionary approach to be applied in the conservation and management of stocks, and places on parties a more extensive obligation of co-operation through regional fisheries bodies.[56] In effect it amends the LOS Convention, as well as other regional and global fisheries treaties covering straddling and highly migratory stocks. Although without prejudice to the rights, jurisdiction and obligations of parties to the LOS Convention, it is to be interpreted and applied "in the context of and in a manner consistent with the Convention".[57] However, it does little to resolve the problems inherent in the LOS Convention scheme for fisheries dispute settlement, and it adds further complexity to the task of deciding which fishery disputes fall within compulsory jurisdiction. The main effect of the Agreement's dispute settlement provisions is largely to replicate the LOS Convention scheme for the benefit of states which are not parties to that Convention.

Application of the 1995 Fish Stocks Agreement

The 1995 Fish Stocks Agreement as a whole applies only to straddling and highly migratory fish stocks in areas beyond national jurisdiction, i.e. on the high seas.[58] Neither term is defined, although highly migratory species are listed in Annex I of the Convention. There are stocks which fall into neither of these categories, it cannot be assumed that all fisheries disputes are potentially subject to the

[56] For details of the negotiation of the Agreement see FAO Fisheries Circular no. 898, *Structure and Process of the 1993–1995 UN Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks* (Rome, 1995). See D. Anderson, "The Straddling Stocks Agreement of 1995" (1996) 46 *International and Comparative Law Quarterly* 463; D. Balton, "Strengthening the Law of the Sea: The New Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks", (1996) 27 *Ocean Development and International Law* 125; D. Freestone, "The Effective Conservation and Management of High Seas Living Resources: Towards a New Regime?", (1995) 5 *Canterbury Law Review* 341; E. Hey, "Global Fisheries Regulation in the First Half of the 1990s", (1996) 11 *International Journal of Marine and Coastal Law* 459; D. Freestone and Z. Makuch, "The New International Environmental Law of Fisheries: The 1995 UN Straddling Stocks Convention", (1996) 7 *Yearbook of International Environmental Law* 3; P. Davies and C. Redgwell, "The International Legal Regulation of Straddling Fish Stocks", (1996) *British Yearbook of International Law* 199; T. Treves, "The Settlement of Disputes According to the Straddling Stocks Agreement of 1995", in A.E. Boyle and D. Freestone (eds.), *International Law and Sustainable Development: Past Achievements and Future Prospects* (Oxford, forthcoming), chapter 11.

[57] Art. 4.

[58] Art. 3.

Agreement's provisions. In particular, the Agreement appears not to cover stocks which are exclusive to one EEZ or are shared across several EEZs, nor would it apply to stocks which are found only on the high seas. However, there are, exceptionally, certain Articles which also apply to straddling stocks *within* the EEZ and which thus place some obligations on coastal states with regard to the management of these stocks. The essential point is that in the conservation and management of straddling stocks within the EEZ coastal states are required to apply the general principles of Article 5, the precautionary measures of Article 6, and to a more limited extent the compatibility with conservation measures in adjoining areas provisions of Article 7.[59] These are of course precisely the matters which are most likely to affect other states, both in adjacent EEZs and on the high seas, and therefore to generate disputes.

Under Article 1(3) the Agreement specifically applies *mutatis mutandis* to "other fishing entities whose vessels fish on the high seas". This novel provision is intended to allow for Taiwanese participation in the Agreement, without having to address that country's uncertain international status.[60] It opens up the possibility of entities other than states becoming subject to the Agreement's compulsory dispute provisions to an extent not provided for in the LOS Convention. The LOS Convention does permit entities which are not states to appear before the Seabed Disputes Chamber, or, with the consent of other parties to a dispute, in litigation before ITLOS, but it does not envisage them becoming subject to the compulsory settlement provisions of Part XV.[61] This omission is potentially rectified by the Agreement.

Dispute Avoidance

Parties to the Agreement have the same freedom to settle disputes by any agreed means as they enjoy under the LOS Convention. Unilateral compulsory settlement is therefore again a residual measure of last resort. The Agreement goes further, however, in obliging parties to co-operate to prevent disputes from arising. Article 28 thus requires them to strengthen or agree on "efficient and expeditious decision-making procedures" within fisheries management bodies. The Agreement as a whole tries to enhance the role and effectiveness of these

[59] See Freestone and Makuch, note 56 above; Davies and Redgwell, note 56 above; and on Art. 6, see D. Freestone, "International Fisheries Law Since Rio: The Continued Rise of the Precautionary Principle", in A.E. Boyle and D. Freestone (eds.), *International law and Sustainable Development: Past Achievements and Future Prospects* (Oxford, 1999).

[60] Note, however, that there is no provision for a "fishing entity" to become a party to the Agreement. Since no treaty can bind a non-party without its consent (Vienna Convention on the Law of Treaties, Arts. 35–37) it must be assumed that "application" of the Agreement to a fishing entity can only create rights and obligations with the consent of the entity concerned. On the present legal status of Taiwan, see J.-M. Henckaerts (ed.), *The International Legal Status of Taiwan in the New World Order* (London, 1996); and see also Boyle, note 42 above.

[61] See the LOS Convention, Arts. 187, 190 and 279–287, and Annex VI, Art. 20. For a fuller analysis of this issue, see Boyle, notes 42 and 53 above.

bodies, and this Article is a frank admission that if they did work better there would be fewer disputes for other fora to settle. Another novel provision seeks to encourage informal settlement of disputes concerning "matters of a technical nature" by an *ad hoc* expert panel whose role is to try to resolve matters expeditiously without recourse to binding procedures.[62] The parties themselves are expected to establish the panel. Much effort has thus been devoted to minimising the need for formal dispute settlement, and to avoiding the expense, delay and complexity of international litigation. This is undoubtedly the correct approach, but it assumes that the applicable rules of international law are clear enough to provide the necessary guidance. In fisheries disputes that may not be the case.

Importation of the LOS Convention Dispute Settlement Provisions

Article 30 provides simply that Part XV of the LOS Convention applies *mutatis mutandis* to any dispute concerning interpretation or application of the Agreement, whether or not the parties to that dispute are also parties to the LOS Convention. In effect Part XV is incorporated into the Agreement by reference, without any significant alteration beyond what is necessary to permit non-parties to the LOS Convention to nominate conciliators, arbitrators and experts, and to designate a preferred forum for compulsory settlement.

There will thus be compulsory settlement for fisheries disputes under the Agreement in largely the same circumstances as already apply under the LOS Convention. This means of course that disputes concerning the exercise of a coastal state's sovereign rights in the EEZ will be excluded under Article 297(3). Indeed Article 32 of the Agreement makes this clear by stating explicitly that that Article applies also to the Agreement. Thus although Articles 5, 6 and 7 of the Agreement are, as we have seen, applicable to coastal states, their application cannot be the subject of compulsory jurisdiction if properly characterised as involving the exercise of sovereign rights. Disputes about harvesting capacity of the coastal state, allocation of surpluses to other states, and the terms of coastal state conservation and management laws will thus be subject only to the conciliation requirements of Article 297(3)(b).

It might be argued that Article 7 strengthens the case for putting EEZ straddling stocks within compulsory settlement. This is the Article which requires coastal and high seas fishing states to make every effort to agree on compatible conservation and management measures for straddling stocks within a reasonable time. It also provides that if such measures cannot be agreed any party may invoke the Agreement's procedures for settlement of disputes. This of course begs the question what those procedures are in such a case: as between compulsory binding adjudication or non-binding conciliation it points neither one way nor the other. It is true that the Article goes on to allow a "court or

[62] Art. 29.

tribunal" to prescribe provisional measures in such disputes, but this does not demonstrate that the same court or tribunal is intended to have compulsory jurisdiction to determine the merits. Moreover, although the Article does place some obligations on coastal states with regard to the management of EEZ stocks, it is principally aimed at ensuring that high seas stocks are managed in such a manner that the effectiveness of conservation and management measures in the EEZ is not undermined.[63] Given Article 7's limited impact on coastal state management of EEZ stocks, and its very different treatment of high seas fishing, it is difficult to read into it any intention to clarify the applicability of compulsory dispute settlement in regard to straddling stocks.

Despite the significant changes which the 1995 Fish Stocks Agreement makes to the substantive LOS Convention fisheries law, it remains far from clear, for the reasons set out in the previous paragraphs, that disputes concerning coastal state over-fishing or inadequate management of straddling stocks within its own EEZ can usefully be the subject of any form of binding process initiated by another fishing state or entity, even if there is a serious impact on the viability of stocks in other EEZs or on the high seas beyond national jurisdiction. Conciliation appears to remain the most that may be available as of right in such cases, and then only on the limited terms described earlier.

The converse is not true as regards high seas fishing states, however. As we saw earlier, because over-fishing by these states would not fall within the Article 297 exclusions, it could be the subject of a compulsory binding process. The imbalance of compulsory jurisdiction over high seas states and EEZ states which is one of the more remarkable features of Part XV of the LOS Convention has been faithfully and fully reproduced in the 1995 Fish Stocks Agreement by virtue of its lock-stock-and-barrel incorporation of Part XV. The conclusion which flows from this is obvious: that the 1995 Fish Stocks Agreement does not reform the existing LOS Convention scheme relating to fisheries disputes, but merely extends it with all its imperfections to non-LOS Convention states.

Application to Other Fishery Agreements

If the 1995 Fish Stocks Agreement does nothing to change the LOS Convention dispute settlement system, the same cannot be said of its impact on disputes under other fishery treaties. Article 30(2) provides that Part XV of the LOS Convention applies *mutatis mutandis* to any subregional, regional or global agreement relating to straddling or highly migratory stocks, including "any dispute concerning the conservation and management of such stocks". On one interpretation this merely means that all such agreements are covered by Article 288(2), and will be subject to the jurisdiction of a court or tribunal under Part XV if "submitted to it in accordance with the agreement". As we saw earlier, this

[63] See especially Art. 7(2). Davies and Redgwell, note 56 above at p. 263, regard this Article as "evidence of the priority accorded coastal state interest".

interpretation would not necessarily import compulsory jurisdiction into these agreements.[64] Article 30(2) would on that view be limited to extending to non-LOS Convention states the benefits of Article 288(2), whatever these may be. The alternative and better view is more far-reaching: that, as between parties to the Fish Stocks Agreement, Article 30(2) amends existing fishery treaties and incorporates into them the disputes settlement provisions of Part XV of the LOS Convention. This is closer to what Article 30(2) actually says. Moreover, not only does Article 30(2) not refer to Article 288, but it avoids entirely any reference to the submission of a dispute to a court or tribunal "in accordance with" the relevant fisheries treaty.

The latter interpretation is not merely textually more convincing, it is also considerably closer to the object and purpose of the 1995 Fish Stocks Agreement and to the intent of the parties to the negotiations.[65] If the Agreement is to work effectively it must change existing law and existing treaties, and that purpose is borne out additionally by Article 30(5). That Article prescribes the law to be applied in all disputes arising under the Agreement *or any other fishery treaty*:

> "Any court or tribunal to which a dispute has been submitted under this Part shall apply the relevant provisions of the Convention, of this Agreement and of any relevant subregional, regional or global fisheries agreement, as well as generally accepted standards for the conservation and management of living resources and other rules of international law not incompatible with the Convention, with a view to ensuring the conservation of the straddling fish stocks and highly migratory fish stocks concerned."

The effect of this provision is to amend the substantive terms of other fisheries treaties insofar as they are inconsistent with the new law laid down in the Agreement. From this perspective it is far from radical to see Article 30(2) as also importing new or stronger dispute settlement provisions into existing treaties. In these two significant ways the Agreement thus adds to the dispute settlement provisions of the LOS Convention, expanding both the category of disputes subject to compulsory jurisdiction and the law to be applied in resolving these disputes.[66]

Provisional Measures

The Agreement does make one change to the disputes settlement Articles of the LOS Convention. Article 290 of the Convention allows a court or tribunal to prescribe provisional measures to protect the rights of the parties or to prevent

[64] Section 4(4).
[65] Balton, note 56 above.
[66] *Ibid.*, p. 143.

serious harm to the marine environment.[67] It says nothing about fisheries. Article 31 of the Agreement rectifies this deficiency by allowing a court or tribunal to prescribe provisional measures to prevent damage to the fish stocks in question. There is also, as we have seen, power to order provisional measures pending agreement between coastal and high seas fishing states under Articles 7 and 16 of the Agreement.

Conclusions

Modern fisheries law has for some time recognised the special interest of coastal states in the management of adjacent high seas fisheries. It has been slower to acknowledge a comparable interest on the part of high seas fishing states in the conservation and management of EEZ stocks by coastal states. This imbalance of rights and obligations between these two groups of states continues to be reflected in the fisheries Articles of the LOS Convention and in the 1995 Fish Stocks Agreement. Equitable utilisation of common property resources does not of course mean equality of rights and obligations for all concerned. It can even lead to preferential rights for coastal states, as in the 1974 *Fisheries Jurisdiction Cases*. So long as high seas fishing rights remain, however, the law will always involve regulating some kind of equitable balance of interests between coastal and high seas fishing states, even if that balance is increasingly lopsided.

Much of the LOS Convention is about balancing the interests of different groups of states, and maintaining that balance is one of the reasons for adopting the principle of compulsory binding dispute settlement in Part XV of the Convention. Disputes about straddling fish stocks are necessarily disputes about the balance between coastal and high seas fishing states and, more generally, about the interest of the international community in sustainable utilisation of fish stocks and preservation of the marine ecosystem. Leaving aside for the moment the problem of interpreting the Convention and the Agreement, and viewing the matter from this broader perspective, it is easier to see that, while coastal states and high seas states may have unequal rights and obligations with regard to fisheries access and management, they do have an equal interest in access to dispute settlement options. Both share a need for authoritative interpretation of difficult and complex texts; in both cases compulsory dispute settlement may be required in the event of failure to reach agreement on the management of shared access to straddling stocks. To hold that only coastal states have the right to compulsory binding settlement in such cases is to stabilise and protect one side of an equitable balance while leaving the other side vulnerable to erosion and instability. Put crudely, it enables coastal states to

[67] On the application of this Article, see *M/V Saiga (No. 2)* (*St Vincent and the Grenadines* v *Guinea*), (1998) ITLOS No. 2.

protect and possibly expand their rights while denying the same privilege to high seas states.

The question whether disputes concerning all or part of a straddling stock fall inside or outside compulsory jurisdiction is thus more than a technical question of treaty interpretation. It poses some fundamental questions about the nature of equitable utilisation as a legal principle governing the use of common resources and about equitable access to justice in international law. If, as we have seen, the question cannot be answered decisively by reference to textual analysis, the intention of the parties, or *travaux préparatoires*, but remains open for judicial resolution, then it is not difficult to suggest a clear answer. Both in the interests of equitable access to justice, and the effective management and sustainable use of straddling stocks, compulsory jurisdiction should apply to all aspects of such a dispute. The rights of coastal states must of course be maintained, but they should also be accountable for compliance with their obligations insofar as these affect other states or the international community as a whole. The exception for sovereign rights created by Article 297(3) of the Convention and incorporated in the 1995 Fish Stocks Agreement should thus be construed narrowly, to cover only the exercise of coastal state discretion on matters that are purely of EEZ concern only, i.e. matters which do not affect straddling stocks, whether inside or outside the EEZ.